



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **NOV 21 2013**

OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, Nebraska Service Center and came before the Administration Appeals Office (AAO) on appeal. The director's decision was affirmed and the appeal was dismissed by the AAO on July 26, 2013. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be granted. The previous decision of the AAO, dated July 26, 2013 will be affirmed, and the petition will remain denied.

The petitioner describes itself as a hospital. It seeks to permanently employ the beneficiary in the United States as a "Community Health Manager." The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

At issue in this case is whether the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).¹ The priority date of the petition is August 8, 2012.²

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree in "Business Administration or related."
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: "Health Administration or medical related."
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: Left blank.

Part J of the labor certification states that the beneficiary possesses a Master's degree in "International Business" from the [REDACTED] completed in 2011. The record contains a copy of the beneficiary's Master of Science in International Business diploma and transcripts from the [REDACTED] issued in 2011.

The director's decision denying the petition stated that because the beneficiary's Master's degree in International Business from [REDACTED] is from an entity that is not an

¹ See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

² The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

accredited institution recognized by the U.S. Department of Education (DOE), the beneficiary does not meet the educational qualifications of the labor certification for classification as an advanced degree professional.

In affirming the director's decision, the AAO also determined, beyond the decision of the director, that the petitioner did not establish its ability to pay the beneficiary's proffered wage from the priority date onward.

On motion, counsel for the petitioner states that the beneficiary's Master's degree in International Business from [REDACTED] qualifies her as an advanced degree professional because: (1) the definition of "advanced degree" in 8 C.F.R. § 204.5(k)(2) does not state that the degree must be issued from an accredited institution; (2) [REDACTED] is an institution that has been certified by the U.S. Department of Homeland Security under the Student and Exchange Visitor Program (SEVP); and (3) [REDACTED] has been accredited by the California Bureau for Private Postsecondary Education (BPPE). Counsel also asserts that the petitioner has the continuing ability to pay the beneficiary's proffered wage.

The instant motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. Therefore, the petitioner's motion is properly filed. The AAO conducts appellate review on a *de novo* basis.³ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴ A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.⁵

³ See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

⁴ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵ See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

II. LAW AND ANALYSIS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁶ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

the purpose of “matching” them with those of corresponding United States workers so that it will then be “in a position to meet the requirement of the law,” namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or

professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. The beneficiary possesses a Master's degree in "International Business" from the California International University (CIU), which has not been accredited by a recognized accrediting agency. For the reasons set forth below, a degree from an unaccredited institution will not be considered an advanced degree under 8 C.F.R. § 204.5(k)(2).

In the United States, institutions of higher education are not authorized or accredited by the federal government.⁷ Instead, the authority to issue degrees is granted at the state level. However, state approval to operate is not the same as accreditation by a recognized accrediting agency.

According to the U.S. Department of Education (DOE), "[t]he goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality."⁸ Accreditation also ensures the nationwide recognition of a school's degrees by employers and other institutions, and also provides institutions and its students with access to federal funding.

Accrediting agencies are private educational associations that develop evaluation criteria reflecting the qualities of a sound educational program, and conduct evaluations to assess whether institutions meet those criteria.⁹ Institutions that meet an accrediting agency's criteria are then "accredited" by that agency.¹⁰

The DOE and the Council for Higher Education Accreditation (CHEA) are the two entities responsible for the recognition of accrediting bodies in the United States. While the DOE does not accredit institutions, it is required by law to publish a list of recognized accrediting agencies that are deemed reliable authorities as to the quality of education provided by the institutions they accredit.¹¹

The CHEA, an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. The presidents of American universities and colleges established CHEA in 1996 "to strengthen higher education through strengthened accreditation of higher education institutions."¹² CHEA also recognizes accrediting organizations. "Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established."¹³ According to CHEA, accrediting institutions of higher education "involves hundreds of self-evaluations and site visits each year, attracts thousands of

⁷ See <http://ope.ed.gov/accreditation>.

⁸ <http://www2.ed.gov/print/admins/finaid/accred/accreditation.html>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf.

¹³ *Id.*

higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.”¹⁴

As stated in the AAO’s July 26, 2013 decision, the DOE and CHEA recognize six regional associations that accredit U.S. colleges and universities, one of which is the Western Association of Schools and Colleges (WASC), the accrediting association with jurisdiction over California, where [REDACTED] is located.¹⁵ WASC’s website lists all accredited institutions within its jurisdiction, and [REDACTED] is not named as one of the accredited institutions. See www.wascsenior.org/apps/institutions (accessed November 6, 2013). Therefore, [REDACTED] has not been accredited by a recognized accrediting agency.

While [REDACTED] is approved to operate in California by the Bureau for Private Postsecondary Education (BPPE), the fact remains that it is an unaccredited institution. The State of California acknowledges “accreditation as an indication of the quality of education offered,” and that institutions “must be accredited by an agency recognized by the [DOE] in order for it or its students to receive federal funds.” http://www.cpec.ca.gov/x_collegeguide_old/accreditation.asp. California’s Education Code states that approval to operate in California is granted after the BPPE has verified that the institution “has the capacity to satisfy the minimum operating standards.” Cal. Ed. Code section 94887.

Accreditation provides assurance of a basic level of quality of the education provided by an institution as well as the nationwide acceptance of its degrees. A degree from a state approved institution that is unaccredited does not provide a sufficient assurance of quality. Therefore, since the beneficiary’s in Master’s degree in International Business from [REDACTED] is not from an accredited institution of higher education, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

The AAO rejects counsel’s claim that the beneficiary’s degree from [REDACTED] should be accepted as an advanced degree because U.S. Immigration and Customs Enforcement has approved the school to enroll foreign students under the Student and Exchange Visitor Program. The approval of an institution to enroll nonimmigrant foreign students pursuant to 8 C.F.R. § 214.3 is unrelated to the requirements for immigrant classification as an advanced degree professional. As stated in the AAO’s July 26, 2013 decision, a broad range of educational institutions may be approved to enroll foreign students, including community colleges, junior colleges, seminaries, conservatories, high schools, elementary schools, and institutions which provide language training, instruction in the liberal arts or fine arts, and/or instruction in the professions. *Id.* The fact that an institution is authorized to enroll nonimmigrant students does not mean that its degrees meet the requirements of an advanced degree under 8 C.F.R. § 204.5(k)(2). Counsel takes issue with this assertion that After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the beneficiary

¹⁴ *Id.*

¹⁵ See <http://www.chea.org/Directories/regional.asp>.

does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

The Minimum Requirements of the Offered Position

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. See *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a Master's degree in "Business Administration or related," or in an alternate field of study, "Health Administration or medical related." For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses a Master's degree in "Business Administration," in "Health Administration," or a master's degree in a related field of study to these degrees.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

The Ability to Pay the Proffered Wage

The petitioner must demonstrate the continuing ability to pay the proffered wage from the priority date onward. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

On motion, counsel has submitted sufficient evidence to establish that the petitioner has the continuing ability to pay the beneficiary's proffered wage. Therefore, the AAO's previous holding regarding the petitioner's ability to pay the proffered wage is withdrawn.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. As stated above, the petitioner has established its ability to pay the beneficiary's proffered wage, and the AAO's July 26, 2013 finding in this regard is withdrawn. However, the other aspects of the AAO's July 26, 2013 decision are affirmed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is granted, and the decision of the AAO, dated July 26, 2013, is affirmed in part. The petition remains denied.